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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,
v.
AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF MCI TELECOMMUNICATIONS CORPORATION

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REPLY BRIEF OF MCI TELECOMMUNICATIONS CORPORATION

The wisdom and importance of the FCC's permissive detariffing rule are not in dispute. Nor does AT&T challenge the FCC policy judgments supporting the rule; indeed, AT&T has elsewhere agreed that "carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably," and has argued that tariff regulation "impedes the dynamism of a competitive market and imposes both direct and indirect costs on users."[1] Aside from dominant carriers, who must still file tariffs, no party challenged permissive detariffing before this Court or before the Commission. Consumers uniformly support it. Nor is there any dispute that the Commission will continue to enforce the prohibitions of unreasonable and discriminatory pricing contained in the Communications Act, 47 U.S.C. §§ 201, 202, against all carriers—dominant and nondominant alike.

The only question in this case is whether the Communications Act unambiguously precludes the FCC from responding to dramatic changes in the telecommunications market by modifying the traditional statutory tariff filing requirement for nondominant carriers—carriers that, in AT&T's words, "cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably." *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In answering that question, AT&T's broad-brush structural and historical analysis—which relies on cases deciding different issues under a different statute—is no substitute for careful attention to the text of the Communications Act.

The text of Section 203 makes plain that Congress did not foreclose permissive detariffing. Section 203(b)(2)

[1] Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, at 16-17 (cited in MCI's opening brief at 16 n.20).

expressly authorizes the FCC to "modify any requirement made by . . . this section." That language necessarily includes Section 203's requirement that carriers "shall . . . file" tariffs. Section 203(c) likewise makes clear that Congress contemplated untariffed service as authorized "by *or under authority of*" the Act, thus demonstrating Congress's judgment that tariffs would not invariably be necessary to ensure enforcement of the substantive prohibitions against unreasonable or discriminatory rates. Read in light of Section 203(c), Section 203(b)(2) must naturally, if not inevitably, be understood to confer on the FCC the authority to forego tariffs under appropriate conditions. The Commission's reading of Section 203 is not only permissible and thus entitled to deference, *see Chevron*—it is the most reasonable interpretation of the statutory text.

Lacking a persuasive textual argument, AT&T contends that permissive detariffing exceeds the FCC's authority because it is inconsistent with the "filed rate doctrine," which was in place when the 1934 Congress passed the Communications Act. According to AT&T, the 1934 Congress must have *assumed* the FCC would use tariffs to enforce the substantive mandates of Title II. The question here, however, is whether the 1934 Congress affirmatively *legislated* an inflexible and unyielding tariff requirement. Congress plainly did not do so. To the contrary, whatever the 1934 Congress may have assumed, the statute Congress enacted in 1934 expressly delegates to the FCC the power to determine the conditions under which tariffs are not needed. That delegation is entirely consistent with Congress's general effort in 1934 to create "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).[2]

[2] *Pottsville* involved 47 U.S.C. § 154(j), which applies to Title II as well as Title III of the Act.

Deference to the FCC's exercise of delegated authority is plainly warranted in this case. Where, as here, dramatic and unforeseen changes in the competitive structure of a regulated industry render prior enforcement methods counterproductive, agencies must be given the leeway to adapt their methods to new conditions, so long as Congress has not expressly foreclosed the agency's choice. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968). Such deference is all the more appropriate here because Congress has repeatedly *ratified* the permissive detariffing rule, and enacted legislation that makes sense only in the context of permissive detariffing.

A. The Text of the Communications Act Supports the FCC's Authority to Modify the Tariff Requirement.

1. The linchpin of AT&T's textual argument is that "modify" does not mean "eliminate," and should be construed to allow only "circumscribed alterations" to the "time, form, content or place of required rate filings." AT&T Br. at 17, 19, 11. But Section 203(b)(2) authorizes the FCC to "modify *any requirement* made by or under the authority of" Section 203. In applying to "any requirement," Section 203(b)(2) authorizes the FCC to "modify" Section 203's basic requirement that carriers "shall . . . file" tariffs, § 203(a), and provide service only at tariffed rates, § 203(c). The FCC modified that requirement by making it *conditional*, applicable to carriers only in certain specified circumstances (where the carrier has market power).

As a matter of ordinary usage, it is as much a "modification" of a requirement to change the conditions under which it applies (*when* something must be done) as to change the specific duties imposed when it does apply (*what* must be done). The Commission's interpretation of "modify" is therefore an entirely familiar one—no different from the meaning of the term when a contract is modified to make a previously absolute duty conditional on some future event. *See Webster's New International*

Dictionary 1577 (2d ed. 1934) ("qualify"). All legal requirements take the form of "if X, then Y;" the requirement may be modified as much by altering X (the conditions) as by altering Y (the consequences).

Indeed, AT&T's reading would render Section 203(b)(2) largely superfluous: If Section 203(b)(2) did *not* authorize the FCC to qualify or condition the basic tariff filing requirement, it is unclear what function the provision would serve. Many of the "requirements" imposed by Section 203 are already subject to Commission discretion, wholly apart from the Section 203(b)(2) "modification" authority.[3] Similarly, no "modification" authority would be needed for the Commission to give more concrete definition to the required content of a required tariff—Section 203(a) requires filing of "all charges," specifically including "the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a).

What remains, then, are (1) a 120-day notice requirement for tariff changes (§ 203(b)(1)); (2) the basic requirement (at issue here) of filing a tariff before offering service (§ 203(a); first clause of § 203(c)); and (3) the requirement to follow a tariff once filed (second clause of § 203(c)). It hardly seems likely that *both of* the latter two requirements are excluded from a provision permitting the FCC to "modify *any* requirement" under "this section." If that view were right, Section 203(b)(2) could as readily have been written to authorize modification only of the 120-day notice rule or, at most, of the requirements of "this *sub*section." The broader language of Section 203(b)(2) strongly supports the reading the FCC attributes to it.

2. The text of Section 203(c) also powerfully supports the FCC's reading of the statute. Having said in

[3] For example, the "other information," printing, and public posting requirements of Section 203(a), and the notice-of-change requirements of Section 203(b), are expressly limited to such requirements as the Commission may prescribe.

Section 203(a) that carriers shall file tariffs, then provided in Section 203(b) both for changes in tariffs and for Commission modification of requirements under the section, Congress specifically said in Section 203(c) that no carrier may offer service except under tariff—"*unless otherwise provided by or under authority of this chapter.*" This language makes clear that Congress contemplated untariffed service, and thus directly undermines AT&T's argument that the requirement to file a tariff is an unalterable demand of the Communications Act.

Forced to concede that this clause in Section 203(c) contemplates "exemptions" from the Act's tariff filing requirements, AT&T seeks to save its construction of Section 203 by contending that untariffed service must be authorized by "other" provisions of the Act, not Section 203 itself. AT&T Br. at 20. That reading is not defensible. The reference to "this chapter" plainly *includes* Section 203; it is not limited, by its terms or otherwise, to "other provisions" of the chapter, as AT&T's argument would require. *See* AT&T Br. at 19. And it is natural, if not inescapable, to read the "unless . . . provided . . . under authority of this chapter" clause in Section 203(c) as referring specifically to the modification authority conferred in Section 203(b)(2), the immediately preceding sentence.

In any event, AT&T's argument does not explain the "or under authority of" language in Section 203(c). Congress's use of the disjunctive "or" makes clear that the Commission has been granted the authority to remove tariff requirements under certain conditions, even if the Act itself has not done so. None of the "other provisions" cited by AT&T delegates authority to the Commission to remove tariff filing requirements. *See* AT&T Br. at 20 n.26 (citing §§ 201(b), 205, 210, 211, 332(c)(1)(A)). Sections 201(b) and 211 have nothing to do with the filing of *tariffs* ("schedules," using the statutory term): They provide for FCC-created exceptions to the require-

ment that *contracts between carriers* ("contracts, agreements, or arrangements") generally be filed (47 U.S.C. §§ 201, 211(a)). Section 210 does not authorize the Commission to remove tariff requirements for any service. Likewise, Section 205 does not authorize the FCC to permit service without a tariff: It merely allows the FCC to prescribe alternative rates if it finds a particular tariffed rate unreasonable, and FCC regulations anticipate that the carrier will file a substitute tariff incorporating the prescribed rate. *See* 47 C.F.R. § 61.69.

Even if these provisions create statutory "exemptions" from the tariff filing requirement—and they do not—none delegates "authority" to the Commission to decide whether to remove tariff requirements. Thus, these provisions cannot explain the existence of the "or under authority of" clause of Section 203(c). AT&T has not identified any other provision of the original Communications Act authorizing the Commission to remove tariff requirements.[4] Apart from Section 203(b)(2), no provision would appear to confer that power. The "under authority of" clause in Section 203(c) must, therefore, contemplate untariffed service pursuant to the Commission's exercise of its Section 203(b)(2) modification authority. If it does not, the 1934 Congress's decision to include the "or under authority of" clause in Section 203(c) would have had no meaning.

3. For these reasons, AT&T must be wrong that the power conferred by Section 203(b)(2) to "modify any requirement made by" Section 203 does not encompass the power to remove the tariff requirement. Congress contemplated that service could be provided without a tariff when authorized by the Commission, and Section 203(b)(2) is the only provision in Title II that plainly empowers the Commission to condition the tariff requirement on the existence of particular circumstances or conditions. There is thus no reason to assume that Congress intended to restrict the term "modify" to "circumscribed alterations" (*MCI Communications Corp. v. Federal Communications Comm'n*, 765 F.2d 1186, 1192 (D.C. Cir. 1985); Pet. App. 53a), rather than giving it the broader meaning of which it is capable. The narrower definition imposed by the appeals court ignores the obvious permissibility of referring to a "major" or "dramatic" modification. *E.g., Webster's Ninth New Collegiate Dictionary* 763 (1983) ("to make basic or fundamental changes in[,] often to give a new orientation to or to serve a new end").[5]

[4] AT&T also cites Section 332(c)(1)(A), but that provision was added to the Act after 1934, and thus cannot explain the meaning of the "under authority of" language enacted in 1934.

In practical as well as textual terms, moreover, the FCC's modification does not amount to an "eliminat[ion]." The FCC did not abrogate the statutory command so that it no longer can or does apply to anyone. To the contrary, the FCC's policy establishes preconditions for removal of the tariff obligation that the largest carriers,

[5] AT&T used the term in that sense in the 1982 "Modification of Final Judgment," the renowned divestiture decree. *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). That decree "modified" a 1956 decree governing AT&T by replacing it "in its entirety" with a radically new and different set of provisions. *Id.* at 226. It was AT&T that proposed the label and the procedural form of a "modified" judgment, ultimately accepted by the district court with further modifications, in putting forth this revolutionary transformation—what the district court called a "major modification" (*id.* at 144 n.51)—of the predecessor decree. *Id.* at 140-41.

MCI also notes that there are differences between the mandatory detariffing rule struck down at MCI's insistence in 1985 and the permissive detariffing rule at issue here. *See MCI Telecommunications Corp. v. Federal Communications Comm'n*, 765 F.2d 1186 (D.C. Cir. 1985). We acknowledge, however, that the interpretation of the term "modify" urged by MCI in that case was unduly narrow. Especially in light of this Court's decisions applying *Chevron*, it is clear that MCI's prior view gave insufficient deference to the FCC's interpretation. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-02 (1992); *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991).

like AT&T and the dominant Regional Bell Operating Companies, do not meet. The result is that the majority of telephone calls for the majority of customers continue to be provided under tariff. *See MCI v. FCC*, 765 F.2d at 1189. Thus, permissive detariffing in practical effect applies to a "circumscribed" portion of the market.

4. AT&T also briefly adverts to the statutory reference to "special circumstances or conditions." 47 U.S.C. § 203(b)(2).[6] AT&T Br. at 19. But that language authorizes generally applicable modifications—e.g., a reduction of the statutory notice period to forty-five days or less for *all* carriers (47 C.F.R. § 61.58); or the further reduction of the notice period to one day for nondominant carriers such as those at issue here (47 C.F.R. § 61.23). Thus, this language is no impediment to modifying a requirement for a large class of carriers.

Beyond that, the statutory reference to "circumstances" or "conditions" strikingly *supports* the view that "modify" encompasses the power to remove the tariff requirement when particular "circumstances" or "conditions" are present. Indeed, the most natural reading of this provision is that the 1934 Congress anticipated that conditions in the telecommunications market could change, and intended to give the Commission sufficiently flexible authority to respond to those changes.

Furthermore, the FCC's detariffing policy readily comes within the most sensible reading of the term "special." In the world the 1934 Congress knew, a particular market in which the Bell System monopoly was subject to substantial competition would unquestionably have been a "special circumstance[] or condition[]"—warranting invocation of the exemption authority if otherwise justified on policy grounds.[7] It would be perverse to read the

[6] The statute, in addition to allowing exemptions in "particular instances," allows exemptions "by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b)(2).

[7] Notwithstanding AT&T's efforts to cloud the issue by referring to (and misstating the thrust of) legislative history surrounding passage of the Interstate Commerce Act (AT&T Br. at 30-31), there is no question that the 1934 Congress imposed rate regulation because the "[t]elephone business is a monopoly—it is supposed to be regulated." *Preliminary Report on Communications Companies*, H.R. Rep. No. 1273, 73d Cong., 2d Sess. at xxxi (1934).

statute as demanding that such an exemption come to an end, or not be extended, if those same circumstances become more common. It is far more natural, and certainly reasonable, to read "special" as covering any relevant departure from the monopoly market structure on which the tariff scheme is premised, however common the departure.

5. Finally, the FCC's interpretation is supported by the fact that it avoids an obvious difficulty of sensible and workable line-drawing—a difficulty created by AT&T's interpretation. If only minor or "circumscribed alterations" are permitted, the Commission and (on review) the courts will be called upon to make exceedingly difficult, and ultimately arbitrary, distinctions between what modifications are permitted and what modifications are too sweeping. Such distinctions are precisely what *Chevron* teaches should be left to the expert agency.

B. The FCC's Interpretation of Section 203(b)(2) Is Consistent with the Purposes of the Communications Act.

Unable to demonstrate that the text of Section 203 forecloses the FCC's permissive detariffing rule, AT&T devotes most of its energy to arguing that permissive detariffing cannot be reconciled with Title II's regulatory framework. This argument fails.

Much of AT&T's argument simply begs the question. For example, the contention that permissive detariffing repeals the filed rate requirements of Section 203(c), *see* AT&T Br. at 21, is entirely circular. By its own terms, Section 203(c) makes clear that the filed rate requirements apply "unless otherwise provided by or under authority of this chapter." The requirements plainly do not apply when they are removed by operation of the statute itself or by an exercise of the Commission's delegated

authority. AT&T's argument that permissive detariffing effectively repeals Section 204 (which authorizes the FCC to suspend or investigate a rate before it takes effect) is similarly circular. Section 204 continues to apply whenever rates must be filed, but does not apply when rates need not be filed.[8]

Nor is there merit to AT&T's argument that permissive detariffing repeals Sections 201 and 202. Those provisions remain in full force, and all carriers are under a continuing duty to obey them. The Commission has made clear that it will investigate and enforce the provisions vigorously should violations be alleged. The Commission has simply decided that the self-enforcing pressures facing nondominant carriers, supplemented by the complaint process, will ensure widespread compliance with the Act.

Having conceded that "carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably," *see* note 1 *supra,* AT&T cannot now take issue with the reasonableness of the Commission's conclusion that Sections 201 and 202 can be enforced without tariffs. Indeed, this is precisely the kind of issue where deference should be at its zenith. *See Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); *Chevron,* 467 U.S. at 864-66. Thus, there is simply no foundation for AT&T's argument that permissive detariffing will undermine the statutory scheme.

In any event, the Commission's judgments are manifestly reasonable, and plainly entitled to deference under *Chevron*. Tariff filings are required to aid, through publication of charges, in the prevention of unreasonable rates and unjust discrimination. But the Commission in

[8] In any event, the significance AT&T attributes to this point is considerably overstated. Tariffed rates for nondominant carriers may now go into effect on one day's notice, effectively precluding FCC suspension and investigation prior to the effective date of a tariff. One day notice has been upheld under the ICA, *see Southern Motor Carriers Rate Conference v. United States,* 773 F.2d 1561, 1571 (11th Cir. 1985), in the face of an argument that it effectively repealed the suspension provision of the ICA.

this proceeding, following its decade-old analysis, concluded that mandating tariffs for firms lacking market power is not needed to serve those purposes and, indeed, tends to *harm* the Act's basic policy of lower rates (47 U.S.C. § 151). For such nondominant carriers, the Commission concluded, market forces and the complaint process will be sufficient to serve those purposes. *See* Pet. App. 28a (noting availability of complaint process under 47 U.S.C. § 208). Nothing in the Act requires the Commission to rely on the review and suspension process of § 204, rather than the complaint process, as its primary means of enforcement. *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 543-46 (1978).

The goal of "just and reasonable" rates is to approximate the rates produced by a competitive market by trying to bring prices down to cost.[9] It is therefore fair to presume that prices set by firms lacking market power will be just and reasonable: If they were too high, a competitor would underbid them.[10] Similarly, discrimination in an economically significant sense—differential treatment of "similarly situated" customers (AT&T Br. at 24 n.33, 30)—depends on market power.[11] If a firm without

[9] *See* 1 A. Kahn, *The Economics of Regulation* 26 (1988) ("Just as competition is supposed to hold prices down to the cost of production . . . so regulation takes cost as its standard of the 'revenue requirements' of public utility companies, hence the 'just and reasonable' rates that the typical controlling statute enjoins them to maintain."); *id.* at 63 ("The traditional legal criteria of proper public utility rates have always borne a strong resemblance to the criteria of the competitive market in long-run equilibrium.").

[10] *See* Pet. App. 6a; First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* 85 F.C.C.2d 1, 20-21 (1980); Notice of Inquiry and Proposed Rulemaking, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* 77 F.C.C.2d 308, 334-36 (1979).

[11] *See* L. Sullivan, *Handbook of the Law of Antitrust* 89 (1977) ("A firm will not discriminate unless it has market power. In a competitive market, a firm cannot sell above the competitive price

market power succeeds in charging different prices for the same service, those differences presumptively result from different costs of serving the particular customers, reflecting competitive forces: Otherwise the "disfavored purchaser (that is, a purchaser asked to pay a price above marginal costs) would walk away from that seller and find someone willing to sell at the competitive price." H. Hovenkamp, *Economics and Federal Antitrust Law* 339 (1985).[12] Thus, the Commission plainly acted reasonably when it concluded that unreasonable or discriminatory pricing by nondominant carriers would be sufficiently rare that a universal tariff requirement was not needed.

Furthermore, it is simply incorrect that price discrimination provisions are unenforceable in the absence of published rates. Federal and state authorities have long enforced general price discrimination statutes, such as the Robinson-Patman Act, 15 U.S.C. § 13(a), and state unfair competition laws, without any requirement that prices be published.

At bottom, AT&T's argument rests not on the text of the Communications Act or any genuine incompatibility between permissive detariffing and the policies embodied in the Act, but on the historic significance of the "filed rate doctrine." As AT&T would have it, filed rates must continue to be required in all circumstances because historically it has been so, and the 1934 Congress must have

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and has no reason to sell below it; all its sales will cluster at its costs (including a reasonable return)."); *see also* 9 P. Areeda, *Antitrust Law* ¶ 1711a, at 119-20 (1991); F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 489 (3d ed. 1990) ("[T]he seller must have some control over price—some monopoly power. A purely competitive firm cannot discriminate profitably.").

[12] Not even the Robinson-Patman Act condemns "price differences that result from or further the forces of competition." *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2586 (1993); *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n*, 440 U.S. 69, 80 (1979).

assumed it would be so when it passed the Communications Act.

The 1934 Congress may have anticipated that the FCC would rely on tariff-based regulation to control the monopoly power of the Bell System. But the critical question is whether the 1934 Congress legislated so as to foreclose any departure from an unyielding tariff requirement. Where, as here, a statute is premised on a broad public interest regulatory framework giving the agency wide latitude, and where a radical change in the structure of the regulated industry has occurred since Congress passed the original legislation, reviewing courts should be particularly careful not to mistake unlegislated assumptions about regulatory methods for legislatively imposed obligations. Innovations should be permitted so long as they are not directly foreclosed by the clear commands of the statute, even if they are in some tension with unlegislated assumptions.[13]

That is precisely the lesson of the *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968).[14] In *Permian Basin* the Court upheld a Federal Power Commission (FPC) rule that (i) replaced traditional filed rate requirements with a regime whereby certain producers abided by "area rates" and (ii) exempted small producers from tariff filing requirements. *Id.* at 764-65. The Court acknowledged that the filing requirements in the Federal Power Act were "without exception or qualification," *id.* at 787,[15] yet it upheld the filing exemption for small pro-

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[13] *See* Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2088 (1990).

[14] *Cf. Kansas Cities v. Federal Energy Regulatory Comm'n*, 723 F.2d 82, 95 (D.C. Cir. 1983) ("The . . . combination of technical compliance with the language of the statute plus unusual circumstances justif[ies] departure from the agency obligations ordinarily implied by such language . . . ."); *New England Coalition on Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127, 1129 (D.C. Cir. 1984).

[15] The language of the tariff statute is virtually identical to the Communications Act: "[E]very natural-gas company shall file

ducers as "fully consistent with the terms and purposes of [the Commission's] statutory responsibilities" and held that the exemption "did not exceed the Commission's statutory authority." *Id.*[16] As the Court acknowledged in *Permian Basin*, the FPC's modifications of the regulatory scheme departed from Congress's original assumption that every producer would have to file each of its rates individually. But the Court concluded that these assumptions should not preclude the FPC from adjusting the regulatory regime to account for substantial changes in the market structure of the regulated industry.

Because the Court in *Permian Basin* found under far less clear statutory language that the FPC had the power to remove tariff filing requirements under certain conditions, it should follow *a fortiori* that the FCC has the authority under Section 203(b)(2) to do so, provided that the FCC continues to enforce the substantive requirements of Title II.[17] An interpretation of the FCC's modification

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with the Commission . . . schedules showing all rates and charges," 15 U.S.C. § 717c(c), as is its proscription of discriminatory rates, *id.* § 717c(b).

[16] The relevant language in the Federal Power Act is, if anything, less expansive than that in the Communications Act. *Compare* 15 U.S.C. § 717o (FPC may "classify persons and matters . . . and prescribe *different requirements*") *with* 47 U.S.C. § 203(b)(2) (FCC may "*modify any requirement* made by or under the authority of this section") (emphasis added). The "different" requirement upheld in *Permian Basin* was a complete exemption from the requirement to file tariffs.

[17] *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380 (1974), is not to the contrary. In that case, the Court simply held that the Commission's power to alter the mechanism by which it enforced its substantive mandates—i.e., substituting area-rates for individual rates, and removing tariff requirements—did not extend so far as to allow the FPC to exempt a class of producers from the underlying substantive requirement that rates be just and reasonable. In this case, the Commission has done no such thing. *See Federal Energy Regulatory Comm'n v. Pennzoil Producing Co.*, 439 U.S. 508, 516-17 (1979) ("*Texaco* did not purport to circumscribe so severely the Commission's discretion to decide what formulas and methods it will employ to ensure just and reasonable rates. Indeed

authority that permits wider rather than narrower leeway for the Commission to respond to changing market conditions is consistent with the broad delegation of flexible authority that is at the heart of the Communications Act, *see* 47 U.S.C. § 154(j); *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. at 138, consistent with the teaching of *Permian Basin*, and consistent with the deference reviewing courts owe to agency exercises of power expressly delegated by Congress. *See Chevron*.

C. *Maislin* and the Interstate Commerce Act Do Not Support a More Restrictive Reading of Section 203(b)(2).

AT&T also continues to rely on the "filed rate doctrine," as elaborated by this Court in the context of the Interstate Commerce Act in *Maislin Indus. U.S., Inc. v. Primary Steel Inc.*, 497 U.S. 116 (1990), and prior cases. *See* AT&T Br. at 25-41. The Communications Act was generally modelled on the Interstate Commerce Act (ICA) (*see* S. Rep. No. 781, 73d Cong., 2d Sess. (1934)). What this case involves, however, is the scope of the explicitly granted authority to modify the tariff filing requirement in the Communications Act.[18] And that authority is not controlled by the Interstate Commerce Act, much less by precedents addressing "the obligation to adhere to those rates [which are filed]," rather than the distinct "obligation to file rates" in the first place. AT&T Br. at 28.

1. Important differences between the relevant modification provisions of the ICA and the Communications Act—49 U.S.C. § 10762(d)(1) versus 47 U.S.C.

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the decision underscored the wide discretion vested in the Commission.").

[18] There appears to be no legislative history directly addressing the scope of the modification authority. *See* S. Rep. No. 781, 73d Cong., 2d Sess. (1934). The critical Senate Report indicates that the Communications Act was *generally* modelled on the ICA. *Id.* at 2. But that fact provides no controlling guidance. *See* pages 16-18, *infra*.

§ 203(b)(2)—make clear that a narrow construction of the former should not control the latter. First, the ICA's Section 10762(d)(1) modification authority does *not* by its terms apply to Section 10761(a)'s command (the counterpart of the first clause of Section 203(c)) that the carrier not offer service without filing a tariff (the flip side of the direct command to file a tariff). Rather, Section 10762(d)(1) permits modification only of the "requirements of *this* section," thus excluding Section 10761; Section 10762 addresses only the notice period for tariffs. Although AT&T now contends that this separation of the modification authority and the filed rate requirement as a consequence of the 1978 recodification is immaterial (AT&T Br. at 27-28), this separation was central to the conclusions of both the D.C. Circuit and the Interstate Commerce Commission (ICC) that the filed rate requirements of the ICA could not be made conditional. *See Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986); *International Joint Through Rates Involving Ocean Carriers*, 1 I.C.C.2d 978 (1985). Section 203(b)(2), by contrast, allows modification of any requirement in Section 203, necessarily including the companion filing requirements of both Section 203(a) and Section 203(c).

Second, the command of Section 10761(a) is subject to a specific, separate modification provision, and *that* provision (§ 10761(b)) is conspicuously applicable only to *contract* carriers, thus pointedly excluding common carriers. *See Maislin*, 497 U.S. at 135-36. The modification authority of Section 10762(d)(1) might have to be read narrowly in light of the negative implication that could be drawn from that pointed limitation in Section 10761(b). No such separate provision, or basis for a negative implication, is present under the Communications Act.

2. Furthermore, *Maislin* did not even address the scope of agency authority to modify the duty to file a tariff. Rather, it addressed the duty to *follow* a tariff that has been filed, and the scope of agency authority to

decline to enforce *that* duty. At no point in *Maislin* did the Court construe provisions authorizing exceptions to the tariff *filing* requirement because the ICC did not purport to act under such provisions.

As Justice Scalia's concurrence makes clear, *Maislin* involved the unmodified "obligation to charge the filed rate," *not* the scope of the duty to file rates in the first place (which *is* subject to exceptions). *Maislin*, 497 U.S. at 136-37. Thus, the Court held that the "filed rate doctrine" barred the ICC from deeming collection of the full filed rate inequitable, because the statute itself "forbids . . . collection of rates lower than the filed rate." *Id.* at 130. The doctrine's bar on "deviation from the filed rate" (*id.* at 131), and hence the Court's holding in *Maislin*, does not apply where there is no filed rate at all. The permissibility of exceptions to the filing requirement presents a separate question. Whatever the answer under the ICA, the FCC's answer under the Communications Act was plainly reasonable.

The distinction between the duty to follow filed rates and the duty to file rates in the first place is a crucial one for regulatory schemes involving broad delegation of authority to administrative agencies, like the Communications Act and the ICA. If the agency has left the filing requirement in place, there can be little basis for authorizing *sub silentio* an exemption from filing through disregard of a filed tariff—which works a kind of deception of the public. *Cf. Maislin*, 497 U.S. at 130, 133. In contrast, when the agency expressly and reasonably determines that tariffs need not be filed under certain conditions, there is neither a misleading of the public nor a lack of authoritative administrative findings as to the needed means of fulfilling the statutory objectives. In short, however rigid the statutory bar on an agency's decision to declare adherence to filed rates inequitable—the issue in *Maislin*—that bar simply does not extend to a responsible agency determination of the circumstances in which carriers should not have to file tariffs.

D. Congressional Ratification of Permissive Detariffing Defeats AT&T's Argument.

1. Contrary to AT&T's argument (AT&T Br. at 42-43), MCI does not contend that Congress has merely acquiesced in the Commission's permissive detariffing rule. Rather, MCI argues that Congress was well aware of permissive detariffing and repeatedly *ratified* it by amending Title II, including Section 203 itself, without disturbing the FCC's interpretation of its authority. *See* MCI Br. at 28-29. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986). AT&T simply ignored this "persuasive evidence" of congressional intent. *See generally* Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1021-1022 (1992).

Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986), makes exactly this point. There, the Court refused to overrule the judicially-crafted *Keogh* "filed rate" exemption from antitrust damages because Congress, fully aware of *Keogh*, had amended the Clayton Act without altering the judicial interpretation. Thus, far from supporting AT&T's position, *Square D* makes clear that ratification "lends powerful support" to the validity of the Commission's permissive detariffing rule. 476 U.S. at 419.

2. AT&T also fails to come to grips with the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226, which makes clear that Congress understood, and agreed with, permissive detariffing. AT&T suggests that Congress enacted TOCSIA cognizant of the "historic understanding" that rates must be filed. AT&T Br. at 43. That is simply wrong. The House and Senate reports both make clear

that Congress knew of the FCC's permissive detariffing rule. Congress enacted TOCSIA because it wanted to *restore* tariff requirements for pay phone operators, as a result of particular abuses. Furthermore, Congress's decision to authorize the FCC to remove TOCSIA's particular tariff requirements, 47 U.S.C. § 226(h), would make little sense if, as a result of exercising that power, carriers would be required to comply with the *more extensive* tariff requirements of Section 203. *See* MCI Br. at 30-31. *See generally National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) (agency interpretation should be accepted if a contrary interpretation would render subsequent legislation superfluous).

AT&T's argument that TOCSIA was not intended to "alter" obligations under other sections of the Communications Act is beside the point. AT&T Br. at 42-43. MCI does not contend that TOCSIA "altered" anything. To the contrary, it is MCI's position that the FCC's permissive detariffing rule, which was promulgated long before TOCSIA and was well known to Congress, constitutes a *correct* interpretation of Section 203(b).

3. Finally, AT&T cites to 47 U.S.C. § 332(c)(1) (allowing the FCC to waive tariff requirements for commercial mobile service providers) to argue that Congress knows how to give the FCC authority to forego tariff filing requirements when it wants to do so. *See* AT&T Br. at 44. The legislative history of Section 332(c)(1), however, strongly supports the conclusion that Congress was aware of and agreed with the FCC's permissive detariffing policy. This amendment—which focused on a particular provision of Title III (and not Title II) of the Act, and was contained in the massive Omnibus Budget Reconciliation Act of 1993—was undertaken with full awareness of the on-going litigation challenging the FCC's permissive detariffing policy. *See* H.R. Rep. 111, 103d Cong., 1st Sess. 260-61 (1993). As Senator Inouye stated, the amendments were intended to "*clarify* that the [FCC] has the flexibility in implementing the regulatory parity pro-

visions to amend, modify, or forbear from any regulation" of certain carriers in the mobile services marketplace. 139 Cong. Rec. S7856 (daily ed. June 24, 1993) (emphasis added).

Far from rejecting the FCC's permissive detariffing policy, the amendments *embraced* the very analysis used by the FCC in permissive detariffing. Indeed, Congress specifically instructed the FCC that it *could not* modify requirements necessary to ensure just and nondiscriminatory rates, but that it *could* make tariff filing optional for nondominant carriers.[19] Thus, Congress plainly perceives no incompatibility between permissive detariffing and enforcement of Title II's substantive requirements.[20]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[19] H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993).

[20] In the only other instance where Congress enacted detariffing legislation, it also made clear that it was not altering the FCC's then nascent detariffing policy. *See* 47 U.S.C. § 222. In bringing record carriers under Title II with the Record Carrier Competition Act of 1981, sponsors of the bill made clear that the FCC already had the authority to detariff: "The basic concept in these proposed amendments is that the Federal Communications Commission currently *has the authority* to do everything that the bill *directs* them to do. . . . It is not our intent to override, either explicitly or implicitly, other sections of the Communications Act. . . . Nor are we saying that the Commission does not currently *have the authority to forebear from regulation.*" 127 Cong. Rec. S31986 (daily ed. Dec. 16, 1981) (statement of Sen. Cannon) (emphasis added); *see id.* at S31985 (statement of Sen. Goldwater). The Record Carrier Act actually *reduced* the FCC's discretion by directing the Commission to detariff when certain conditions were present, rather than leaving it entirely to the Commission's discretion.

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